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Senate

On the Nomination of Judge Samuel Alito

Of the three branches of our Federal Government, the Supreme Court seems the most removed from the American people. There are, as we know, only nine members of the Supreme Court. None of them, in the end, is accountable to the public. They certainly do not have to face groups of angry voters as you and I do from time to time, at townhall meetings or local potluck dinners, and they are probably thankful for that.

However, their actions can have a tremendous and lasting effect on the lives of every American, probably more so than any Senator or Governor, or perhaps even more than many Presidents. For, in the end, the Supreme Court exists as the last bastion of protection for the rights and freedoms we enjoy as Americans. That is why I take so seriously, as I know you do, our obligation as Senators to provide advice and consent to our Presidents, as required by our Constitution, to determine whether their nominees truly merit a lifetime appointment to serve on our Nation's highest Court.

When I voted for Judge John Roberts' nomination to become Chief Justice of the Supreme Court last fall, I said

standing here that it was a close call, at least for me. Ultimately, though, I chose to take what I described then as a leap of faith. As someone whose political and legal opinions are perhaps somewhat more conservative than mine, I knew Chief Justice Roberts would sometimes render decisions with which I may not be comfortable or entirely agree. But after carefully reviewing his testimony, and discussing that testimony with Democratic and Republican members of the Senate Judiciary Committee, meeting with him and other interested parties, and talking to his colleagues, colleagues of his who had known and worked with him in the past, I concluded John Roberts was a worthy successor to Chief Justice Rehnquist and was not likely to shift the balance of the Court in any significant way.

Obviously, more than three-fourths of our colleagues agreed with that decision. When the time had come to cast my vote, I concluded that Chief Justice Roberts' decisions would not be guided by ideology alone, but also by legal precedent and the combination of his life's experiences as a judge, as an attorney, as an academic, as a father, and as a husband. In short, by supporting

John Roberts' nomination I voted my hopes and not my fears.

After we confirmed Chief Justice Roberts and turned to face yet another impending Supreme Court vacancy, I urged President Bush to send us a nominee similar to the person he or she would replace--Justice Sandra Day O'Connor. I noted that his next choice could divide this Congress and our country even further, or it could serve to bring us closer together. In my view, we needed that type of consensus candidate to replace Justice O'Connor and her legacy on the Court.

For more than 20 years, Justice O'Connor has been a voice of moderation during often difficult and tumultuous times. As we all know, her decisions oftentimes determined the direction of the Court. Not infrequently, the opinions she wrote reflected the prevailing sentiment of our country and its citizens, too. In my view, she was the right Justice at the right time.

Unfortunately, and with some regret, I rise today not fully convinced that Judge Samuel Alito is the right person to replace Justice O'Connor on the Supreme Court. Unlike a few months ago, when I rose to support the nomination of John Roberts, I will not be supporting Judge Alito's nomination to the Supreme Court. In sharing that decision today, though, let me be clear on several points. I will not be voting against his confirmation because I don't believe he has the legal qualifications, the intellect, or the experience necessary to sit on the Supreme Court. I do. He is clearly very bright and demonstrates an excellent grasp of the law.

I will not be voting against him because I don't like him or respect him. I do. He is described by a number of his colleagues as collegial, as hard working, and as a devoted father and husband. I believe Samuel Alito is an honorable person and that he has lived an honorable life.

Having said that, though, I don't believe we should vote for Supreme Court Justices based solely on their qualifications and likeability. We must also consider their judgment, their legal opinions, their judicial philosophies, and what they said or did not say during the confirmation hearings, in order to determine whether we are truly comfortable with the direction a particular nominee will take our Nation's highest Court. After all, these are lifetime appointments that will have consequences for decades into the future.

In the end, I found myself asking one simple question. Here it is: Is Judge Samuel Alito the right person for this vacancy, not just for now but for decades to come? For me, the answer to that question is, regrettably, no. Let me take a few minutes to explain why.

As we all know, our Constitution provides for three separate but equal branches of Government--the legislative branch, that is us, the Congress; the executive branch, the Presidency and his or her administration; and the judicial branch, the courts. The Framers of our Constitution believed no branch of our Federal Government was superior to another, so our Founding Fathers established an intricate system of checks and balances to ensure that each branch kept a watchful eye on the others.

For instance, it is Congress's job to represent the people and write the laws of our land, but the President can refuse to sign a bill the Congress has passed if he or she disagrees with our conclusions. Congress can then come and override a President's objections, if we can muster the necessary votes. Meanwhile, the Supreme Court can rule that a law is, in part or in whole, unconstitutional, providing yet another important check on the power vested in the Congress and in the Presidency.

Admittedly, it is not the most harmonious or quickest form of Government, but it has served our country well for over 200 years. Perhaps it was Churchill who said it best when he described democracy as the worst form of government devised by wit of man, but for all the rest.

I am concerned that, if confirmed, Judge Alito, during the decades he is likely to serve may well take the Court in a new direction that serves to undermine our system of checks and balances, threatening the rights and freedoms many of us hold dear.

Let me elaborate, if I may. In the past, Judge Alito has advocated for what is known as the "unitary executive theory."

Until a couple of months ago, I had not heard of that. If you are like me, Mr. President, and you didn't go to law school, you are probably wondering what that means. Let me put it simply. It basically means that Judge Alito feels that the President should largely be allowed to act without having to worry much about Congress or the Supreme Court stepping in and saying: With all due respect, you are out of line.

This line of thinking deeply concerns me and, I believe, many of my colleagues and the people we represent. And it should. Remember, our Nation declared her independence from Britain because we no longer wanted to be ruled by a king, or, frankly, by anyone with king-like powers. Our Founders wanted power to be invested in the people and shared equally by the three branches of Government.

To say then that there are times when a President's power should go largely unchecked except in very rare instances, in my opinion, goes against what our Founders intended. Moreover, unfettered Presidential power could have dangerous consequences, given how a particular President--either now or in the future--chooses to exercise that kind of unchecked power.

Let me give you a recent real-world example. Over the past few months, the Bush administration has been embroiled in several controversies, as we know, over its policies concerning the torture of detainees, as well as its decision to spy on or intercept phone calls and e-mails apparently of thousands of people living in the United States who are suspected of being agents of foreign countries or entities. In both cases, the administration asserted that it should be able to act without the consent of Congress or the courts.

I disagree. I believe that our courts have an obligation under our laws to monitor an administration's actions concerning foreign prisoners and criminal suspects, and I believe administrations should have to justify, within reasonable periods of time, their decision to spy on

Americans. I will be the first to acknowledge that there are times when the President--this one or another President--needs the ability to conduct secret wiretaps. And I think most of us agree on that point.

The issue, however, is do Presidents have a constitutional right to conduct secret wiretaps without court authorization, without some other branch of Government making sure that that administration isn't breaking the law?

Again, the fundamental issue for me is the issue of checks and balances.

In these instances, Congress and the courts provide a needed and important backstop to make sure that the administration doesn't become overzealous and abuse the rights of innocent people.

Americans may not understand why these issues are such a big deal. They may even agree with the reasons the Bush administration give, for instance, for circumventing the law--a law that has been in place since 1978 which we modified I think about 4 years ago.

But it is not a stretch to understand how a President--maybe not this one but one in the future--could overstep his or her authority and thereby infringe on the civil rights of innocent Americans.

For that reason alone, we should all have grave concerns about an unchecked Presidency--or a Supreme Court Justice who has routinely sided and ruled in favor of unchecked Executive powers.

Jeffrey Stone, a law professor at the University of Chicago, is a supporter of

the Roberts nomination--and initially a supporter of the Alito nomination--wrote recently:

Given the times in which we live, we need and deserve a Supreme Court willing to examine independently these extraordinary assertions of Executive authority. We can fight and win the war on terrorism without inflicting upon ourselves and our posterity another regrettable episode like the Red Scare and the Japanese internment--

Of the 1950s and 1940s, two shameful episodes in the history of our country where our Government seriously infringed on the rights of average Americans under the guise and excuse of national security.

But as Professor Stone went on to say, we will only avoid such terrible excesses of governmental power ``if the Justices of the Supreme Court are willing to fulfill their essential role in our constitutional system."

Based on his history and his opinions--in his own words--I fear that Judge Alito may well change the Court's approach and rule in favor of expanded Presidential power--not just at the expense of Congress and the courts but ultimately at the expense of the American people. We cannot and should not play witness to an unchecked Presidency, regardless of political party, regardless of whether the President is a Democrat or a Republican.

We need in this country for the courts and the Congress to ensure that this administration and future administrations abide by the laws of this land and the principles we hold dear.

Just as I am concerned about Judge Alito's views on expanded Presidential power, I am also concerned about Judge Alito's opinion on the role and powers of Congress.

Traditionally, Congress has enjoyed broad authority, as a coequal branch of Government, to debate and adopt laws that we believe protect the interests of the American people, such as keeping our water clean and our air clean and ensuring that fair labor laws and employment standards across the country are fair.

Back in the 1990s, Congress used that authority to pass a bill that banned the possession or sale of machineguns across State lines among everyday Americans. To me, that ban wasn't about whether people had the right to own guns for recreation or self-protection. Those rights are forever enshrined in our Constitution, as they should be. This was about whether people had the right to own, to buy, or to sell across State lines Army-style machineguns, which I think reasonable people can agree have little, if anything, to do with protecting our homes or going hunting.

Nevertheless, the constitutionality of the law was challenged in the courts. All nine Federal appeals courts that heard the subsequent challenges upheld the validity of the original law.

Judge Alito, as a member of the Federal appeals court that covers Delaware and our surrounding region in the Delaware Valley, heard one of those challenges. He ended up disagreeing with his own court's decision and that of eight other Federal appeals courts which ruled that

Congress does indeed have the authority under our Constitution to ban the sale of machineguns across State lines.

My primary concern is that if Judge Alito thinks Congress shouldn't have the right to pass laws that arguably keep Americans safer, then what other laws might he believe Congress does not have the authority to adopt under the commerce clause of our Constitution? Laws that protect the air we breathe or the water we drink? Laws that allow men and women to take unpaid leave from their jobs to care for members of their family during times of crisis? I don't know, and that uncertainty--at least for me--is a cause of real concern.

A third concern I hold about Judge Alito relates to his views on other rights and freedoms we enjoy as Americans, particularly a woman's right to end a pregnancy prior to fetal viability. My own opinion about abortion is we have far too many of them, and we need to put a lot more effort into reducing the number of abortions that still take place in America. I am sure on that point Judge Alito and I agree.

But I am not certain Judge Alito agrees with me that we should not go back in time to a place where almost all abortion laws were illegal, where women who wanted to end a pregnancy were in too many instances forced into unhealthy behavior that often put their lives and their reproductive futures at risk. That is why, during his confirmation hearing, I was disappointed that Judge Alito, unlike Judge Roberts, declined to acknowledge that the Supreme Court decision that granted women the right to end an early term pregnancy is ``settled law."

Justice O'Connor, whom Judge Alito has been nominated to replace, has been the deciding vote on numerous cases that challenged this precedent. That is why I believe replacing Justice O'Connor with Judge Alito --given his rulings and statements on this subject--may well be putting this precedent in jeopardy.

Let me explain why. In the historic *Planned Parenthood v. Casey* case, Judge Alito voted to uphold a Pennsylvania law requiring married women to notify husbands before obtaining an abortion even during the early stages of pregnancy. That case eventually went to the Supreme Court, which ruled against Judge Alito's position, as we know.

Justice O'Connor, who cast the deciding vote in the Supreme Court overturning the Pennsylvania law and Judge Alito's position, wrote that women do not leave their Constitutional protection at the altar. Married women are entitled to the same protections as single women. I believe she is right.

I had the opportunity to talk with Judge Alito at length recently. I asked him - a conversation that I very much enjoyed - why he ruled the way he did in this instance. He told me he did not think the requirement placed an undue burden on married women. I asked him if he felt the same way today, especially in light of the Supreme Court ruling in opposition to his view. He told me he basically thought the same way. While I respect that honesty, I respectfully disagree and question what other undue burdens he may decide to place on women in the future.

Let me close by saying that this is not an easy vote for me. I know it is not an easy one for a lot of our colleagues. As a former Governor, I believe strongly that this administration or any other administration has the right to nominate judges of the same mind and philosophy. There are consequences in elections. If you win, you have the chance, if you are a Governor or a President, to nominate candidates of your choice for the bench. And I believe Senators should not automatically reject judges outright because of political affiliation or beliefs.

However, politicians of both stripes must take a stand and reject nominees that we believe will take the courts too far to the extreme right or to the extreme left. Wisely, in my State, Delaware's constitution requires overall political balance in our State's courts.

For every Democrat who is appointed to serve as a judge, Delaware Governors have to nominate a Republican. The result has been an absence of political infighting and a balanced, exceptionally and highly regarded State judiciary that we are enormously proud of in our State.

Our Federal Constitution, regrettably, does not require similar political balance when it comes to the judiciary, but political balance should be one of our goals. The Founders of the U.S. Constitution tasked the Senate with finding that balance.

I fear, in the end, that Judge Alito may well upset the balance that exists on the Supreme Court for the better part of my lifetime and move the Court in a direction that will not be best for many of the people of this country.

So this time, unlike my vote for the nomination of John Roberts a few months ago, I will be voting my fears--not my hopes. Having said that, I sincerely wish Judge Alito well.

I hope, if he is confirmed--and I believe that he will be--that he proves my concerns wrong and unfounded. I hope he remembers that our Constitution--that our entire democracy--is both an everlasting and ever-changing experiment. Our Constitution is not something to be strictly interpreted, nor is it something to be recklessly abandoned.

Success in life is often measured not just by the stances we take but by the results we achieve. I believe that is one of the reasons why Justice O'Connor is so revered. It is not because she was always predictable or that she advocated an intractable world view. It is that she found the right balance, even in the most difficult, controversial, and emotional cases of our times.

My fear is that too often Judge Alito may not do so, and thus I will not be supporting his nomination.

My hope, though, is that once he is confirmed to the Supreme Court he will balance the scales of justice and not tip them too far in either direction.

Thank you, Mr. President.